

STATE OF MICHIGAN
COURT OF APPEALS

MARK PORTER,

Plaintiff-Appellant,

v

GEOFFREY FIEGER and FIEGER, FIEGER &
SCHWARTZ, P.C.,

Defendants-Appellees.

UNPUBLISHED

June 29, 2001

No. 221349

Oakland Circuit Court

LC No. 99-013594-NO

Before: Sawyer, P.J., and Griffin and O’Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court’s opinion and order granting defendants’ motion for summary disposition in this action for defamation and intentional infliction of emotional distress. We affirm.

Plaintiff, a police officer who shot and killed an unarmed person while on duty, alleged that defendant Geoffrey Fieger publicly, falsely, and maliciously referred to plaintiff as a “murderer” and an “executioner.” Plaintiff brought this action against Fieger, as well as his law firm, defendant Fieger, Fieger & Schwartz, P.C. The trial court granted defendants’ motion for summary disposition pursuant to MCR 2.116(C)(8), holding that plaintiff was a public official and that plaintiff was unable to prove that the statements were made with actual malice. The trial court also dismissed plaintiff’s claim of intentional infliction of emotional distress because plaintiff failed to offer evidence that he had experienced emotional suffering.

We review de novo the trial court’s decision whether to grant a motion for summary disposition under MCR 2.116(C)(8). *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). Summary disposition is proper where, taking all factual allegations in the complaint as true, the claim “is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). We also bear in mind that, because defamation actions necessarily implicate First Amendment freedoms of speech and expression, summary disposition is an essential tool in protecting against forbidden intrusions into those fields. *Ireland v Edwards*, 230 Mich App 607, 613; 584 NW2d 632 (1998). We hold that the trial court did not err by granting defendants’ motion for summary disposition.

Not all defamatory statements are actionable. *Id.* at 614. Where a statement, although factual and provably false, “could not be interpreted by a reasonable listener or reader as stating actual facts about the plaintiff[.]” the statement is protected by the First Amendment. *Id.* at 617. Thus, a statement that is simply “rhetorical hyperbole” is not actionable. *Id.* at 618-619; *Kevorkian v American Medical Ass’n*, 237 Mich App 1, 7; 602 NW2d 233 (1999). For example, in *Ireland*, *supra* at 610-611, the defendant, an attorney, made several statements to the media during a child-custody battle between her client and the plaintiff. Some of the defendant’s statements essentially claimed that the plaintiff never spent any time with the child, and this Court held that these statements were not actionable, but amounted to “rhetorical hyperbole.” *Id.* at 618-619. The statements “were obviously expressions of disapproval regarding the amount of time plaintiff spent with her child, and, taken literally, they are patently false. However, any reasonable person hearing these remarks in context would have clearly understood what was intended.” *Id.* at 619.

Similarly, in *Kevorkian*, *supra* at 4-6, the defendants made statements to the effect that the plaintiff, a well-known proponent of assisted suicide, was a killer and a murderer. This Court, noting that its decision was strictly limited to the facts of the case, held that the trial court should have granted the defendants’ motion for summary disposition. *Id.* at 10, 14. The panel set forth many reasons for its decision, one of them being that the statements amounted to “nonactionable rhetorical hyperbole” because they could not be understood as stating actual facts about the plaintiff. *Id.* at 13. The panel noted that the plaintiff’s actions in assisting persons with suicide “can be described as murder or mercy, and any reasonable person could understand that both *or neither* could be taken as stating actual facts about [the] plaintiff.” *Id.* at 7. See also *Greenbelt Cooperative Publishing Ass’n, Inc v Bresler*, 398 US 6, 14; 90 S Ct 1537; 26 L Ed 2d 6 (1970) (holding that a reference to the plaintiff’s negotiating position as “blackmail” was not actionable, in that it “was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the plaintiff’s] negotiating position extremely unreasonable”); *Hodgins v The Times Herald Co*, 169 Mich App 245, 253-254; 425 NW2d 522 (1988) (holding that, although direct accusations of criminal conduct are not protected as opinion, “[e]xaggerated language used to express opinion, such as ‘blackmailer,’ ‘traitor’ or ‘crook,’ does not become actionable merely because it could be taken out of context as accusing someone of a crime”).

In this case, plaintiff was a police officer who shot and killed an unarmed citizen. Defendant Fieger’s references to plaintiff as a “murderer” and an “executioner” would be understood by any reasonable listener as rhetorical hyperbole, designed to express the opinion that the shooting was unjustified. Thus, Fieger’s statements could not be understood as stating actual facts about plaintiff. Just as assisting someone to commit suicide may be viewed as mercy or murder, a police shooting of an unarmed person may be viewed as protecting society or murdering a citizen. Fieger’s statements, although certainly containing vigorous epithets, simply conveyed disapproval of the shooting; therefore, they do not subject him to liability for defamation. The freedom of expression guaranteed by the First Amendment protects a statement that cannot be reasonably interpreted as stating actual facts about the plaintiff. *Ireland*, *supra* at 614.

The question whether a statement is an actionable defamatory statement may be decided by a court as a matter of law. *Id.* at 619. Therefore, the trial court appropriately granted

defendants' motion for summary disposition. Although the trial court did not rely on this reasoning, this Court will nonetheless affirm the correct result. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998). Plaintiff's allegations did not show that defendants made an actionably false and defamatory statement concerning plaintiff. Thus, plaintiff failed to satisfy the elements of a defamation claim, and summary disposition was appropriate under MCR 2.116(C)(8).

We also note an alternative ground for granting summary disposition. Plaintiff, a police officer, was a public official for purposes of defamatory statements relating to the performance of his official duties. Thus, plaintiff was required to prove that the statements were made with actual malice. *Garvelink v The Detroit News*, 206 Mich App 604, 608; 522 NW2d 883 (1994). "Actual malice" means that a statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co v Sullivan*, 376 US 254, 279-280; 84 S Ct 710; 11 L Ed 2d 686 (1964). In this case, the circumstances surrounding the shooting were reasonably in dispute. Also, beyond mere conclusory allegations, plaintiff fails to plead actual malice. Mere statements of the pleader's conclusions will not survive a motion for summary disposition. *ETT Ambulance Service Corp v Rockford Ambulance*, 204 Mich App 392, 395; 516 NW2d 498 (1994). Plaintiff fails to specifically plead factual allegations that defendant Fieger knew that his statements were false or entertained serious doubts concerning the truth of his statements. *Ireland, supra* at 622. Plaintiff claims that summary disposition was premature because no discovery had taken place. However, because the motion was brought under MCR 2.116(C)(8), the court only looked to the pleadings. No factual development would justify recovery. Plaintiff simply failed to state a claim on which relief could be granted.

Plaintiff argues that he was not a public official, because he was merely a street-level policeman without control over the affairs of government. However, we need not decide this issue because, in any event, summary disposition of plaintiff's defamation claim was appropriate because defendant Fieger's statements were nonactionable rhetorical hyperbole. Because plaintiff's claim of intentional infliction of emotional distress is based on the same statements, summary disposition of that claim was also appropriate. *Ireland, supra* at 624-625. First Amendment protections are not exclusive to defamation claims. *Collins v Detroit Free Press, Inc*, 244 Mich App 27, 36; 624 NW2d 761 (2001).

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell